Supreme Court, U.S.
FILED

No. 01-1349 JUL 30 2001

OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

BUDDY GRAVER, *et al.*,

Petitioners,

v.

MONSANTO COMPANY, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL, FIFTH CIRCUIT STATE OF LOUISIANA

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Is the failure to provide absent class members notice of a class decertification order a violation of the due process required by the Fourteenth Amendment to the Constitution of the United States and should the failure to provide such notice permit the accrual of a statute of limitations against the uninformed class members?

PARTIES TO THE PROCEEDING

Petitioners (Plaintiffs) - Dudley Adams, Manuel Amedee, Jasper Andress, Lionel Aucoin, Farrell Bailey, April Barbay, David Baudoin, Milton Baudoin, Joseph Becnel, Ray Begue, Sr., Lloyd Bennett, John Blevins, Jr., Herman Borne, George Borne, Jr., Louis Boudreaux, Forrest Boudreaux, Sr., Allen Braud, Robert Brown, Percy Brown, Charles Brown, James Buckley, Charles Buras, Emile Buras, Hurschel Burleigh, Edward Busby, Damase Bye, Edward Caire, Norman Campo, Lloyd Cancienne, Jerry Candies, Charles Carlos, Sidney Champagne, Hubert Champagne, Karl Champagne, Thomas Colvin, Raymond Comardelle, Joseph Corso, Geary Deroche, Howard Ducote, Allan Dufrene, Alvin Dufrene, Wilbur Dufrene, Bobby Dufrene, Harris Dufrene, Sr., Ulysse Dufresne, Shelby Duhe, Rodney Duhon, Sr., Albert Estay, Clarence Faucheux, Roger Folse, Herbert Fontenot, Wilson Fontenot, Franklin Ford, William Fowler, Charles Gillen, Leroy Gonzales, Sr., Buddy Graver, Sidney Guillot, Tommy Gunnels, Johnny Harris, Earl Haydel, Sr., Rene Henry, Jr., Jerry Hogan, Charlie Holmes, Jr., Joseph Howes, Kelsey Hymel, Randall Jones, Joseph Juneau, Buddy Keating, James Kees, Paul Kliebert, Roy Landry, Emile Landry, Jr, Curtis Lee, Leroy Loupe, Russell Loupe, Donald Loupe, Kermit Loupe, Sr., W.J. Loveless, Thomas Mars, Neo Matherne, Charles Matherne, Hilman Matherne, Gerner Matherne, Sr., Antoine Melancon, Frank Miano, Gordon Miller, Archie Mollere, Leo Mangrue, Donald Muller, Jerry Muller, Charles Norfleet, Sr., Elton Ockman, Sr., Gerald Oregon, Sr., Gerald Oubre, Vance Parker, Thomas Pizzolato, Sr., Billy Powel, Lindy Prejeant, James Pumphrey, Robert Pyle, Wendell Rankin, Theophile Rousselle, Jr., Anthony Scanio, Bobbie Selman, Emmett Selman, Gerald Simoneaux, Doyce Smith, Lionel St. Cyr,

Alvin Stepahny, Sr., William Stutchman, Joseph Sylvain, Jimmy Terrebonne, Sidney Torres, Ronald Troxclair, Paul Vicknair, Taylor Vinnett, Paul Vitrano, Jr., Ronald Waguespack, Elisha Walker, Jr., Stanley Wood, Frank Zerangue, Sr., Etienne Zeringue.

Respondents (Defendants) - Monsanto Company, Inc., Lawrence Owens, Robert Himes, Joseph Fischer, W.C. Nolan, Jr., Clinton Roux, George Williamson, Aubrey L. Addison, Daniel Schexnayder and Michael Torres.

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Petitioners, Buddy Graver, et al, request that a writ of certiorari be issued to review the judgment of the Louisiana Court of Appeals, Fifth Circuit, in this matter.

OPINIONS BELOW

An order was entered on June 12, 1997, by the 29th Judicial District Court for St. Charles Parish, State of Louisiana granting class certification for this matter. Upon appeal by Monsanto, the Louisiana Court of Appeal, Fifth Circuit, amended the class definition, but otherwise affirmed the class certification and remanded the matter for further proceedings consistent with that order on June 30, 1998.

On an Application for Supervisory Writs by Monsanto to the Louisiana Supreme Court, the Court, ex parte, recalled and vacated the class certification order, thereby decertifying the class on January 9, 1999.

Subsequently, plaintiffs sought to and did amend the petition to add one hundred seventeen additional plaintiffs. Monsanto responded with an Exception of Prescription, alleging that the claims of the additional plaintiffs were time barred. After a contradictory hearing, the 29th Judicial District Court for St. Charles Parish, State of Louisiana, denied the exception on December 5, 2000. Monsanto then sought appellate review of this order and on February 5, 2001, the Louisiana Court of Appeal, Fifth Circuit, reversed and set aside the order denying the exception, thereby dismissing the claims of the one hundred seventeen newly added plaintiffs.

The plaintiffs timely applied to the Louisiana Supreme Court for supervisory writs to reinstate the decision of the Trial Court; however, that application was denied on May 4, 2001.

STATEMENT OF JURISDICTION

The Louisiana Supreme Court denied Petitioners' application for a supervisory writ on May 4, 2001. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS AND RULES INVOLVED

The Fourteenth Amendment to the United States Constitution states, in pertinent part: "Nor shall any State deprive any person of life, liberty, or property, without due process of law. . . ."

The Constitution of the State of Louisiana provides: "No person shall be deprived of life, liberty, or property except by due process of law."

Federal Rule of Civil Procedure 23(d)(2) states in pertinent part:

> In the conduct of actions to which this rule applies, the court may make appropriate orders: . . . (2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, . . . to intervene and present claims or defenses, or otherwise to come into the action . . .

Federal Rule of Civil Procedure 23(e) states in pertinent part:

> A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.

STATEMENT OF THE CASE

This case poses the question of whether a statute of limitation continues to accrue in favor of a defendant when a class action is decertified and the class members have not received notice of the decertification. Prior to the 1997 amendments, the class action articles of the Louisiana Code of Civil Procedure did not address whether or not prescription (statute of limitations) begins to accrue anew after a class action is decertified, nor did these articles address whether absent class members of a class that is certified, then later decertified, must be given notice of the decertification in order to assert their individual claims within the applicable prescriptive period, post-decertification.

Addressing this hiatus, the Louisiana Legislature adopted La. C.C.P. article 596 in 1997 to alleviate the due process concerns associated with class decertifications and dismissals.[1] Although there was no Louisiana statutory

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1. La. C.C.P. art. 596:

> Liberative prescription on the claims arising out of the transactions or occurences described in a petition

(Cont'd)

requirement prior to the adoption of this article, there existed a constitutional due process requirement requiring decertification notice to the affected class members. LSA-Const. Art. I § 2. In the absence of Louisiana jurisprudence on any class action issue, reference to federal cases is appropriate. *Banks v. New York Life Insurance Co.*, 98-0551, 722 So. 2d 990 (La. 1998).

A. Background of the 1999 Judgment.

In March, 1996, a Petition for Damages in the 29th Judicial District Court, Parish of St. Charles, State of

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(Cont'd)

> brought on behalf of a class is suspended on the filing of the petition as to all members of the class as defined or described therein. Prescription which has been suspended as provided herein, begins to run again:
>
> (1) As to any person electing to be excluded from the class, from the submission of that person's election form;
>
> (2) As to any person excluded from the class pursuant to Article 592, thirty days after mailing or other delivery or publication of a notice to such person that the class has been restricted or otherwise redefined so as to exclude him; or
>
> (3) As to all members, thirty days after mailing or other delivery or publication of a notice to the class that the action has been dismissed, that the demand for class relieve has been stricken pursuant to Article 592, or that the court has denied a motion to certify the class or *has vacated a previous order certifying the class.* (emphasis added)

Louisiana, was filed bearing docket no. 45,965, styled "Buddy Graver, et al v. Monsanto Company, Inc., et al." This was a class action requesting compensatory damages for personal injuries resulting from unprotected exposure to high levels of industrial noises at the Monsanto facility in Luling, Louisiana, thereby causing the employees (putative class members) to suffer high frequency hearing loss. A contradictory class certification hearing was convened before District Judge Joel Chiasson[2] in September, 1996, at which, among others, Buddy Graver, George J. Borne, Jr., Hilman J. Matherne, Gerner Matherne, Herschel Burleigh, and Frank Zerangue, Sr., each testified generally regarding their work experience at the Monsanto facility and, specifically, the difficulties associated with their respective hearing loss. On June 12, 1997, the District Court certified this litigation as a class action. The court certified the class with the following definition:

> All those individuals who worked for the defendant, Monsanto Company, Inc., at the Luling, Louisiana plant any period of time during the years 1953 to 1985 and were exposed to noise levels in excess of 85 decibels on a regular basis."

In June, 1998, the Louisiana Court of Appeal, Fifth Circuit, amended and redefined the trial court's class definition as:

> All those individuals who worked for the defendant, Monsanto Company, Inc., at the

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2. District Judge Joel Chiasson presided at the class certification hearing, but subsequently recused himself because of a conflict of interest, and the matter was re-allotted to District Judge Kirk Granier for decision.

> Luling, Louisiana plant for any period of time during the years 1953 to 1985 and experienced hearing loss identified by a standard threshold shift, as defined by OSHA, on any audiogram performed during their employment with Monsanto between the years 1953 and 1985.

The trial court's certification of the class was affirmed, as amended, and remanded with instructions. On application for supervisory writs by Monsanto, the Louisiana Supreme Court reversed both lower court rulings and decertified the class on January 8, 1999. The Louisiana Supreme Court denied the rehearing application of the plaintiffs on February 26, 1999.

B. The Proceedings Below

After resolution of the class certification issue, a Third Supplemental and Amending petition was filed which sought to add one hundred seventeen plaintiffs to the suit on October 3, 2000. Monsanto responded by filing an Exception of Prescription, urging that the statute of limitation had accrued as to these newly added plaintiffs such that their respective claims were time barred. In December, 2000, the 29th Judicial District Court denied the Exception of Prescription and allowed the addition of the one hundred seventeen plaintiffs. The Louisiana Court of Appeal, Fifth Circuit, vacated and set aside this ruling and granted the Exception of Prescription on February 5, 2001. Subsequently, the Court of Appeal denied plaintiffs' Application for Rehearing on February 23, 2001. The Louisiana Supreme Court denied an Application for Supervisory and/or Remedial Writs filed by the plaintiffs on May 4, 2001.

REASONS FOR GRANTING THE WRIT

I.

THE PETITION SHOULD BE GRANTED BECAUSE THE DECISION BELOW CONFLICTS WITH THE DUE PROCESS REQUIREMENTS OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

The class action articles contained in the Louisiana Code of Civil Procedure, as they existed prior to the 1997 amendments, did not address whether or not prescription begins to accrue anew after a class action is decertified. The pre-1997 class action articles also did not address whether absent class members of a class that is certified, and later decertified, must be given notice of the decertification order, such that each absent class member would be put on notice to assert their individual claims within the applicable prescriptive period, post-decertification. Petitioners submit that fundamental due process requires such notice to the absent putative class members of a decertified class. To wit, how may absent class members, who have no notice that a class has been decertified, determine when to file an individual claim within applicable prescriptive periods after decertification? Absent notice of decertification, other than happenstance, it simply is impossible.

Monsanto cited federal jurisprudence to the Louisiana Court of Appeal, Fifth Circuit, which facially appears to indicate that once the class is decertified, the interruption of the accruing prescription ceases and prescription begins to run anew. *See Orleans Parish School Board v. U.S. Gypsum Company,* 892 F. Supp. 794 (E.D. La. 1995); *Celestine v.*

Citgo Petroleum Corp., 165 F.R.D. 463 (W.D. La. 1995). However, neither of those cases addressed the issue of whether or not the putative class members of a decertified class must receive notice of the decertification order to comport with federal and state due process requirements. The fact is that under the pre-1997 class action articles, no Louisiana state court has ever held that prescription begins to run anew for the putative class members after decertification of the class, absent prior notification of the decertification to the putative class members. This issue is *res nova* and poses a significant issue of law which has not been, but should be, resolved by this Court.

Petitioners suggest that if notification of and class certification is fraught with due process concerns, should not notice of entry of a decertification order be as well? Clearly, the Louisiana Legislature adopted La. C.C.P. article 596 in 1997 to address the due process concerns associated with class decertifications and dismissals.[3] Although there did not exist statutory requirement of notice of the decertification or dismissal to the absent class members in

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3. La. C.C. art. 596 states in pertinent part:

> Liberative prescription on the claims arising out of the transactions or occurrences described in a petition brought on behalf of a class is suspended on the filing of the petition as to all members of the class as defined or described therein. Prescription, which has been suspended as provided herein, begins to run again: . . . (3) As to all members, thirty days after mailing or other delivery or publication of a notice to the class that the action has been dismissed, that the demand for class relief has been stricken pursuant to Article 592, or that the court has denied a motion to certify the class or has vacated a pervious order certifying the class.

pre-1997 cases, there certainly was a constitutional due process requirement requiring this decertification notice. Such has been suggested by federal courts and class action commentators interpreting Fed. R. Civ. P., Rule 23[4] — the federal class action rule which served as the genesis for Louisiana's pre-1997 class action articles. *See Hardy v. Vought Corp.*, 30 Fed. R. Serv. 2d 484 (N.D. Tex. Apr. 2, 1979) (Because of the benefit in securing any statute of limitations defense, the defendant was ordered to pay for newspaper publication of the notice of decertification and to post the notice at one of its facilities for 30 days. The plaintiffs bore the cost of mailing the notice to the absent class members upon whom interrogatories were served.) *See also Newberg on Class Actions*, Section 8.17. (There may, however, be factual circumstances when *due process* can be assured only if Rule 23(d)(2) notice issues. For example, when a class has been decertified, the court may order notice to the absent class members to prevent the running of the statute of limitations on their claims. The rule was enacted for protection of class members.) *See also* Fed. R. Civ. P., Rule 23(e) which states:

> A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.

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4 Fed. R. Civ. P., Rule 23(d)(2) states in pertinent party: In the conduct of actions to which this rule applies, the court may make appropriate orders: . . . (2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, . . . to intervene and present claims or defenses, or otherwise to come into the action . . .

This statutory requirement, based on due process consideration, should be the same for pre-1997 Louisiana class actions in which a decertification order is entered. Unless and until the putative class members receive some form of court-ordered notice of the decertification order, their claims should not be subject to the accrual of prescription.

In the matter sub judice, no order has been forthcoming from the District Court to inform the absent class members that the class action was decertified. Absent and uninformed class members should not suffer the loss of their valuable rights to commence litigation in a timely manner, after decertification of the class, without proper notice of the decertification. Due process demands notification of the decertification by the court and notification to the absent class members that the prescriptive period has begun to run anew, thus adversely affecting the rights of the absent class members. Absent this notification, Monsanto receives a huge litigation windfall in that hundreds of legitimate claims unknowingly become time barred to the detriment of uninformed class members.

Monsanto argues that the newly added plaintiffs had one year from January 8, 1999, to file their amending petition. This argument begs the question: how were those absent class members to learn that January 8, 2000 was the last day to file an individual claim, considering that they had not received a court-ordered notice of the decertification and advice of the time delays?

The statutes which protect the absent class members' rights during the prosecution of the class action should not abandon them, without notice, upon the decertification of the class. *See* Fourteenth Amendment, United States

Constitution; Article I, Section 2 of the Louisiana Constitution.[5] Clearly, due process requirements are not satisfied if only the named class representatives and those who have accidental knowledge of the decertification are allowed an opportunity to file individual claims prior to the accrual of prescription. Applicants urge this is too harsh a result, and that even the Louisiana Legislature recognized this inequity when it promulgated La. C.C.P. art. 596 in 1997. Although art. 596 is only effective for cases filed after July 1, 1997, applicants urge the same result should be reached for cases filed prior to July 1, 1997, based upon constitutional due process mandates.

Therefore, this Court should grant this application for supervisory writs, and direct that when a class action is decertified, the absent class members are entitled to notice of that decertification order.

CONCLUSION

Constitutional due process requires that putative class members of a certified class that is later decertified, must be provided notice of the decertification in order to assert their individual claims within the applicable prescriptive period, post-decertification.

Herein, the absent class members were never notified of the decertification order through the trial court or by court approved notice by counsel, and therefore, they should not

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5. LSA-Const. Art. I § 2:

> No person shall be deprived of life, liberty, or property, except by due process of law.

have their tort claims time barred. To countenance the loss of substantive tort rights by omission deprives individuals of the due process required under the Fourteenth Amendment. Accordingly, the petitioners request that their petition for writ of certiorari be granted and that this Honorable Court order that notice of the decertification order rendered by the Louisiana Supreme Court be disseminated to the putative class members and that the prescriptive period for the putative class members to file their individual claims begins to run anew from the date of the notification.

Respectfully submitted,

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APPENDIX

APPENDIX A — ORDER OF THE COURT OF APPEAL FOR THE FIFTH CIRCUIT OF THE STATE OF LOUISIANA GRANTING WRIT APPLICATION DATED FEBRUARY 5, 2001

Application For Writs

No. 01-C-55

COURT OF APPEAL, FIFTH CIRCUIT
STATE OF LOUISIANA

JAN 19 2001

s/ [illegible]
Clerk

BUDDY GRAVER, ET AL

VERSUS

MONSANTO COMPANY, ET AL

IN RE MONSANTO COMPANY

APPLYING FOR WRIT OF CERTIORARI OR REVIEW FROM THE TWENTY-NINTH JUDICIAL DISTRICT COURT, PARISH OF ST. CHARLES, STATE OF LOUISIANA, NUMBER 45,965, DIRECTED TO THE HONORABLE KIRK R. GRANIER, DIVISION "D"

* * *

Appendix A

WRIT GRANTED.

The filing of the third supplemental and amending petition did not relate back to the filing of the original petition because the requirements of LSA-C.C.P. art. 1153 and the factors set forth in *Giroir v. South Louisiana Medical Center, Division of Hospitals* 475 So. 2d 1040 (La.1985), have not been met.

Further, this action was filed on March 14, 1996. LSA-C.C.P. 596 did not go into effect until July 1, 1997, and it applies only to actions filed on and after its effective date. Therefore, there was no requirement of notice of decertification in this case, and prescription began to run on January 8, 1999, when Louisiana Supreme Court decertified the class. Accordingly, the third amended petition, which was filed in October of 2000, has prescribed.

The decision of the trial court is therefore vacated and set aside; the relator's Exception of Prescription is Granted and the Third Supplemental and amending petition is dismissed.

Gretna, Louisiana, this 5th day of February, 2001.

s/ Walter J. Rothschild
JUDGE WALTER J. ROTHSCHILD

s/ Sol Gothard
JUDGE SOL GOTHARD

s/ Susan M. Chehardy
JUDGE SUSAN M. CHEHARDY

APPENDIX B — JUDGMENT OF THE TWENTY-NINTH JUDICIAL DISTRICT COURT FOR THE PARISH OF ST. CHARLES OF THE STATE OF LOUISIANA DENYING EXCEPTION OF PRESCRIPTION DATED DECEMBER 27, 2000

29TH JUDICIAL DISTRICT COURT
PARISH OF ST. CHARLES
STATE OF LOUISIANA

BUDDY GRAVER, ET AL

VERSUS

MONSANTO COMPANY, INC., ET AL

NO. 45,965 DIV. "E"

JUDGMENT

The Exception of Prescription filed herein by defendant Monsanto Company, Inc. came on for hearing on December 5, 2000 pursuant to regular assignment:

* * *

The Court having considered the Exception of Prescription, the memoranda filed by counsel, the oral argument of counsel at the hearing and the law and evidence being in favor of plaintiffs;

IT IS ORDERED, ADJUDGED AND DECREED that the Exception of Prescription is hereby denied.

Appendix B

JUDGMENT READ, SIGNED AND RENDERED in Hahnville, Louisiana, on this 5th day of December 2000.

Hahnville, Louisiana December 27, 2000.

s/ [illegible]
DISTRICT JUDGE

APPENDIX C — REVERSAL OF DISTRICT COURT RULING OF THE SUPREME COURT OF THE STATE OF LOUISIANA DATED JANUARY 8, 1999

THE SUPREME COURT OF THE STATE OF LOUISIANA

No. 98-C – 2616

BUDDY GRAVER, ET AL

VS.

MONSANTO COMPANY, INC., ET AL

IN RE: Monsanto Company Inc.; — Defendant(s); Applying for Writ of Certiorari and/or Review; Parish of St. Charles, 29th Judicial District Court Div. "D" Number 45,965; to the Court of Appeal, Fifth Circuit, No. 97-CA-0799

January 8, 1999

Granted. The lower court rulings certifying this case as a class action are reversed. See Ford v. Murphy Oil, 702 So.2d 542.

JPV

WFM

CDT

JTK

Appendix C

CALOGERO, C.J. would grant and docket.

LEMMON, J. not on panel.

KIMBALL, J. would grant and docket.

JOHNSON, J. would grant and docket.

Supreme Court of Louisiana
January 8, 1999

s/ [illegible]
Clerk of Court
For the Court

APPENDIX D — NOTICE OF DENIAL OF REHEARING OF THE COURT OF APPEAL FOR THE FIFTH CIRCUIT OF THE STATE OF LOUISIANA DATED SEPTEMBER 17, 1998

COURT OF APPEAL, FIFTH CIRCUIT
STATE OF LOUISIANA

Clerk's Office, Gretna SEP 17 1998

DEAR SIR

REHEARING WAS THIS DAY REFUSED
IN THE CASE ENTITLED

Buddy Graver, et al v. Monsanto Company, Inc., et al

No. 97 CA 799

Very truly yours,

PETER J. FITZGERALD, JR.
Clerk

APPENDIX E — RULING OF THE COURT OF APPEAL FOR THE FIFTH CIRCUIT OF THE STATE OF LOUISIANA DATED JUNE 30, 1998

FIFTH CIRCUIT
COURT OF APPEAL
STATE OF LOUISIANA

NO. 97-CA-799

BUDDY GRAVER, ET AL

VERSUS

MONSANTO COMPANY, INC., ET AL

ON APPEAL FROM THE
TWENTY-NINTH JUDICIAL DISTRICT COURT
PARISH OF ST. CHARLES, STATE OF LOUISIANA
NO. 45,965, DIVISION "D"
HONORABLE KIRK GRANIER, JUDGE

CHARLES GRISBAUM, JR.
CHIEF JUDGE

JUNE 30, 1998

(Court composed of Judges Charles Grisbaum, Jr., H. Charles Gaudin, and Thomas F. Daley)

* * *

This appeal concerns the certification of a class action. We affirm in part and amend in part and remand for proceedings consistent with this opinion.

Appendix D

ISSUES

The principal issue presented is simply whether the plaintiffs-appellees meet the requirements of a class action.

FACTS AND PROCEDURAL HISTORY

On March 14, 1996, the plaintiffs, Buddy Graver, George J. Borne, Jr., and Hilman J. Matherne, individually and on behalf of those similarly situated, filed a class action petition against the defendants, Monsanto Company, Inc. and 28 named supervisors at Monsanto. Plaintiffs are retired Monsanto employees seeking compensatory damages for high frequency hearing loss resulting from unprotected exposure to high levels of industrial noises at the Monsanto facility in Luling, Louisiana. The class of individuals, which the named plaintiffs seek to represent, consists of themselves and all other co-workers similarly situated who worked for Monsanto for a period of time between the years 1953-1985 and who were exposed to noise levels in excess of 85 decibels on a daily basis.

On June 12, 1997, the trial judge certified this case as a class action and defined the class as:

> All those individuals who worked for the defendant, Monsanto Company, at the Luling Louisiana Plant any period of time during the years 1953 to 1985 and were exposed to noise levels in excess of 85 decibels on a regular basis.

See Order Granting Class Certification. Defendants appeal this Order.

Appendix D

PRELIMINARY MATTERS

Appellees filed a Motion to Strike Exhibits, which are not part of the record on appeal, which are attached to appellants' brief, and all reference thereto of: (1) Exhibit "c" — a paper submitted to the 1996 Judicial Conference of the United States Fifth Circuit, and (2) Exhibit "e" — a 1990 article from the Journal of Otolaryngology. They argue that these exhibits were not introduced into evidence at the trial court and, thus, cannot be considered by this Court. We recognize that appellate briefs of parties are not part of the record on appeal, and this Court has no authority to consider on appeal facts referred to in appellate briefs, if those facts are not in the record on appeal. *Geo Consultants Int'l v. Professional Roofing and Const. Inc.*, 95-1016 (La. App. 5th Cir. 3/26/96), 672 So.2d 1002. Although we also have consistently held that examination of exhibits attached to an appellate brief, but not offered into evidence at trial is beyond the scope of review for the Court of Appeal, *Geo*, supra; *Davis v. St. Jude Medical Center, Inc.*, 94-353 (La. App. 5th Cir. 10/25/94), 645 So.2d 771, *writ denied*, 94-2864 (La. 1/27/95), 649 So.2d 387; *Coleman E. Adler & Sons, Inc. v. Waggoner*, 538 So.2d 1131 (La. App. 5th Cir. 1989), the exhibits presented by appellants are not new evidence, nor do they refer to new facts, but merely are cited as persuasive authority to support their legal argument. Appellants purport to attach these exhibits because their counsel did not believe that the articles would be readily available to the Court should this Court wish to peruse them. We, however, find these exhibits to be textual material. Rule 2-15.4 of the Louisiana Uniform Rules, Courts of Appeal, in pertinent part, provides:

Appendix D

> (a) *Textual Materials.* A book, treatise, or other textual material not conveniently available to the court, used as authority during argument by counsel, shall, on request of court, be deposited with the court until the case is decided. By leave of court, a photocopy of the pertinent material may be substituted in lieu of the book, the treatise, or other textual material.

We did not request that the textual material be deposited with us, nor did appellants request leave of court to deposit the material with us. Following the rationale of our jurisprudence, we find that this failure to comply with the appellate court rules leads us to conclude that the textual material was not properly before us. See *Dugas v. Travelers Ins. Co.*, 613 So.2d 1112 (La. App. 3d Cir. 1993). Ergo, the motion to strike the exhibits from appellants' brief is granted.

LAW AND ARGUMENT

Our standard of review in a class action certification is to afford the trial court great discretion. *Clement v. Occidental Chem. Corp.*, 97-246 (La. App. 5th Cir. 9/17/97), 699 So.2d 1110, *writ denied*, 97-2884 (La. 1/30/98) __ So.2d __; *Pulver v. 1st Lake Properties, Inc.*, 96-248 (La. App. 5th Cir. 9/18/96), 681 So.2d 965. Unless the trial court has committed manifest error, we must affirm the order. *Clement*, supra; *Pulver*, supra.

In determining whether to certify an action as a class action under Louisiana law, the following requirements are necessary as found in our jurisprudence:

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1. A class so numerous that joinder is impracticable, and

2. The joinder as parties to the suit one or more persons who are

   (a) members of the class, and

   (b) so situated as to provide adequate representation for absent members of the class, and

3. A "common character" among the rights of the representatives of the class and the absent members of the class.

La. Code Civ. P. arts. 591 and 592; *Clement*, supra; *Pulver*, supra (citing *McCastle v. Rollins Environmental Serv.*, 456 So.2d 612 (La. 1984)). All three of the elements must be met, and it is well settled that it is plaintiff's burden to prove each element by a preponderance of the evidence. *Clement*, supra.

The first requirement, often referred to as "numerosity," is not met by simply alleging a large number of potential claimants. *Clement*, supra. Although the class must be so numerous that joinder is impracticable and must establish a definable group of aggrieved persons, identification of all potential class members is unnecessary. *McGee v. Shell Oil Co.*, 95-64 (La. App. 5th Cir. 6/28/95), 659 So.2d 812, *writ denied*, 95-2476 (La. 12/15/95), 664 So.2d 457. The trial court found that this requirement was satisfied since

appellees' evidence established that at least 100 to 110 persons, employed by appellant, Monsanto, during the years of 1953 to 1985, have demonstrated an Occupational Safety and Health Administration (OSHA) standard threshold shift that meet the class definition. For reasons later assigned, while we agree that a definable group of aggrieved persons has been identified, we do not agree with the trial court's definition of the class.

The second requirement of "proper joinder" is to ensure adequate representation of the absent class members by requiring that one or more of the class members will represent the interests of the entire class adequately. *Clement*, supra. The trial court found that appellees submitted credible evidence that the class representatives and their attorneys will fairly and adequately protect the interest of the class. The trial court also found that the proposed class counsel are competent attorneys, skilled in complex litigation and class actions, and believed that proposed class counsel will diligently and aggressively pursue the class members' claims.

The third requirement is whether the questions of law or fact common to the members of the class predominate over any questions affecting only individual members. *Clement*, supra. The mere fact that varying degrees of damages may result from the same factual transaction and same legal relationship does not defeat a class action. *Clement*, supra (citing *State ex rel. Guste v. Gen. Motors Corp.*, 370 So.2d 477 (La. 1978) (on rehearing)). Here, the trial court concluded that the questions of law and fact common to the members of the class outweigh any questions affecting only individual members, considering:

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a) Whether or not Monsanto knew or should have known as early as the 1950's that excessive noise levels experienced by workers could result in permanent hearing loss;

b) Whether or not Monsanto took any precautions to protect its workers against damages associated with excessive and prolonged exposure to noise at the Monsanto plant in Luling, Louisiana;

c) Whether or not Monsanto provided hearing protection equipment for its employees[;]

d) Whether or not the alleged negligent/ intentional lack of care by Monsanto rose to the level of reckless disregard for the safety of its workers;

e) Whether or not Monsanto represented certain information to its workers regarding their hearing loss and its relation to occupational noise exposure;

e) [sic] Whether or not employees who worked for Monsanto from 1953 to 1985 were exposed to noise levels in excess of 85 decibels on a regular basis;

f) Whether [p]laintiffs' conditions will worsen potentially requiring the

establishment of a monitoring program for class members[;]

g) Whether Monsanto educated class members regarding the potential consequences of excessive noise exposure and any available protective devices for minimization of exposure[;] [and]

h) Monsanto's potential defenses appear applicable to all class members.

See Order Granting Class Certification.

Although appellants rely heavily on the September 9, 1997 Louisiana Supreme Court decision in *Ford v. Murphy Oil, USA, Inc.*, 96-C-2913 c/w 96-C-2917 c/w 96-2929 (La. 9/9/97), 703 So.2d 542, class certification is a determination that must be made on the facts and circumstances of each individual case.[1] In *Ford*, the Louisiana Supreme Court determined that the nature of the claims that were made, the length of time involved, the vast geographical area in which the class members live, and the degree of inconvenience or damages suffered varied greatly as to the individual plaintiffs. Furthermore, the mere finding of the defendant's duty not to pollute was not enough to advance the issues in *Ford*. The Louisiana Supreme Court also recognized there were four different sources of emissions

1. The Louisiana Supreme Court reversed class certification in a mass tort claim alleging property damage and personal injury because of exposure to emissions of four petrochemical plants over a four-year time period.

involved because the claim was against four petrochemical plants located along the Mississippi River from Chalmette to Meraux, Louisiana.

Because we have consistently ruled that the fundamental objective of the class action device is the achievement of economies of time, effort, and expense, it must be decided whether the intertwined goals of effectual substantive law, judicial efficiency, and individual fairness would be better served by class action or some other procedural device such as consolidation. See *Clement*, supra; *Pulver*, supra; and *McGee*, supra. The trial court concluded that the questions of law and fact common to the members of the class outweigh any questions affecting only individual members and that a class action is the preferred procedure to equitably and efficiently adjudicate this controversy. We agree.

Here, even though not all class members' claims arise from the same event, all claims arise from the same practice or course of conduct allegedly exhibited by Monsanto over the years. Appellees and class members' contentions are not varied and only concern the negligence of Monsanto by exposing its employees to high level industrial noises without proper ear protection. Appellees allege that Monsanto had the duty not only to supply the proper ear protection for appellees and class members, but also had a duty to instruct and educate them about the proper use of ear protection and the ultimate effects of not wearing ear protection. Finally, not four individual plants spread over a larger geographical area, but one facility, the Monsanto plant in Luling, is of concern in this case.

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In the final analysis, we agree that the requirements to certify a class action were met and find that the trial court did not commit manifest error and abuse its discretion in certifying the class.

While we find that the trial court did not err in certifying a class, appellants correctly contend that the class definition is impermissibly vague and does not set forth a definable group of aggrieved persons. Accordingly, we will redefine the class, using an objective criteria which was established during the certification hearing.

Appellees sought certification of a class of workers with occupationally induced hearing loss. The trial court certified a class defined as:

> All those individuals who worked for the defendant, Monsanto Company, Inc., at the Luling, Louisiana plant [during] any period of time during the years 1953 to 1985 and were exposed to noise levels in excess of 85 decibels on a regular basis.

See Order Granting Class Certification. This class definition is vague and not self defining because it is not clear what being "exposed to noise levels in excess of 85 decibels on a regular basis" means. The class definition could potentially cover everyone who worked at the plant, because they were exposed to loud noise, or to very few people who worked at the plant, depending on how exposure on a "regular basis" is interpreted.

The 1997 Amendments to La. Code Civ. P. art. 591, which set forth the prerequisites for maintaining class actions,

requires that "The class is or may be defined objectively in terms of ascertainable criteria[.]" La. Code Civ. P. art. 591(A)(5). We recognize that subsection (A)(5) of this code article was not in effect at the time the trial judge certified the class in this case; however, procedural laws may be applied retroactively, unless there is a legislative expression to the contrary. La. Civ. Code art. 6. Accordingly, we will rely on the most recent version of La. Code Civ. P. art. 591 in ruling on this matter and require that the class be defined by objective criteria.

The record contains evidence of an objective criteria, which can be utilized to define the class. Dr. Douglas A. Swift, an expert in the field of Occupational Medicine testified on behalf of the appellants at the certification hearing. Dr. Swift identified certain Monsanto employees that he determined suffered an occupationally related hearing loss. Dr. Swift explained that, in 1982, OSHA put forth a standard for the time period for which an individual could be exposed to certain decibel levels. The general rule is that noise exposure should not exceed 85 decibels over an eight-hour time-weighted average. Dr. Swift further explained that OSHA set forth a criteria, known as the standard threshold shift, which should be used as a measure to detect the earliest possible change in someone's hearing. The standard threshold shift is defined as a 10-decibel average shift over the frequencies of 2,000, 3,000, and 4,000 Hz between the baseline audiogram and any subsequent audiogram.

On an annual basis, each Monsanto Company employee underwent a hearing capacity test. Employees' medical records indicate which employees suffered a standard

threshold shift in hearing capacity during employment at Monsanto. These medical records establish an objective criteria that can be used by the potential class members and appellants to determine inclusion or exclusion from the class. Utilizing this criteria will enable the class to be manageable and include past employees with objective claims, thereby avoiding the difficult management and legal problem of countless meritless claims, which too often accompany class action litigation.

For the reasons stated, the trial court's class definition is amended and redefined as:

> All those individuals who worked for the defendant, Monsanto Company, Inc., at the Luling, Louisiana plant for any period of time during the years 1953 to 1985 and experienced hearing loss identified by a standard threshold shift, as defined by OSHA, on any audiogram performed during their employment with Monsanto between the years 1953 and 1985.

For the foregoing reasons, the trial court's certification of the class is affirmed as amended, and this matter is remanded for proceedings consistent with this opinion. All costs of this appeal are to be assessed against the appellants.

AFFIRMED AS AMENDED AND REMANDED WITH INSTRUCTIONS.

APPENDIX F — ORDER OF THE TWENTY-NINTH JUDICIAL DISTRICT COURT FOR THE PARISH OF ST. CHARLES OF THE STATE OF LOUISIANA GRANTING CLASS CERTIFICATION DATED JUNE 12, 1997

TWENTY-NINTH JUDICIAL DISTRICT COURT
PARISH OF ST. CHARLES
STATE OF LOUISIANA

BUDDY GRAVER, ET AL

VERSUS

MONSANTO COMPANY, INC., ET AL

NO. 45,965 DIV. "D"

ORDER GRANTING CLASS CERTIFICATION

On the 5th day of September 1996, the 29th Judicial District Court Division E, Judge Joel Chaisson, heard Plaintiffs' Motion for Class Certification. After one (1) full day of evidentiary proceedings the Court declined to rule on the class certification issue and instead granted Defendant's Motion for Recusal. The case was reassigned to this division. This Court considered the pleadings on file, the transcript of the class certification hearing, the memoranda, briefs and exhibits in support of, and against the class certification. The Court finds that Plaintiffs' action meets the requirements of Article 591, et seq. of the Louisiana Code of Civil Procedure and should be certified as a Class Action.

In conjunction with the Order, the Court makes the following findings of fact and conclusions of law.

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A. FINDINGS OF FACTS

1. Plaintiffs request certification of the following class of Plaintiffs in an action against Monsanto Company, Inc. ("Monsanto"):

> All those individuals who worked for the defendant, Monsanto Company, Inc., at the Luling, Louisiana plant any period of time during the years 1953 to 1985 and were exposed to noise levels in excess or 85 decibels on a regular basis.

2. Plaintiffs submitted credible evidence that the class is so numerous that joinder of all members is impracticable. Defendant's expert, Dr. Swift, established that at least 100 to 110 persons (transcript p. 51) demonstrated an OSHA standard threshold shift, that meet the class definition. Based upon this and other evidence submitted at the class certification hearing, Plaintiff's satisfy the numerosity requirement of L.S.A.-LCCP Article 591.

3. Plaintiffs submitted credible evidence identifying a defined community of interests and common character of rights to be enforced for members of the class and between the rights of class representatives and the absent class members.

4. Plaintiffs submitted credible evidence identifying multiple questions of both law and fact that are common to all members of the class. These common questions of law and fact predominate over individual ones. Some of the questions include:

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a) Whether or not Monsanto knew or should have known as early as the 1950's that excessive noise levels experienced by workers could result in permanent hearing loss.

b) Whether or not Monsanto took any precautions to protect its workers against damages associated with excessive and prolonged exposure to noise at the Monsanto plant in Luling, Louisiana;

c) Whether or not Monsanto provided hearing protection equipment for its employees;

d) Whether or not the alleged negligent/ intentional lack of care by Monsanto rose to the level of reckless disregard for the safety of its workers;

e) Whether or not Monsanto represented certain information to its workers regarding their hearing loss and its relation to occupational noise exposure;

e) Whether or not employees who worked for Monsanto from 1953 to 1985 were exposed to noise levels in excess of 85 decibels on a regular basis;

f) Whether Plaintiffs' conditions will worsen potentially requiring the establishment of a monitoring program for class members;

g) Whether Monsanto educated class members regarding the potential consequences of excessive noise exposure and any available protective devices for minimization of exposure;

h) Monsanto's potential defenses appear applicable to all class members.

5. Plaintiffs submitted credible evidence of the similarity of claims between the representative parties and the class as a whole. The Court considered the deposition testimony of the class representative, the testimony of the experts and the documentary evidence. The Court finds the claims of the class representatives typical and representative of the class members. The Court further finds no conflicts of interest between the class representatives and the class members.

6. Plaintiffs submitted credible evidence that the class representatives and their attorneys will fairly and adequately protect the interest of the class. The Court finds that the proposed class counsel are competent attorneys, skilled in complex litigation and class actions. The Court finds that proposed class counsel will diligently and aggressively pursue the class members' claims.

7. Plaintiffs submitted credible evidence that separate lawsuits by individual members of the class would create a risk of inconsistent or varying adjudications, and would establish incongruous standards of conduct for this defendant.

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8. The Court concludes that the questions of law and fact common to the members of the class outweigh any questions affecting only individual members. A class action is the preferred procedure to equitably and efficiently adjudicate this controversy. In finding this, the Court considered the following matters:

a) The interest of members of the class in individually controlling the prosecution or defense of separate actions;

b) The extent and nature of any litigation concerning the controversy already commenced by or against members of the class;

c) The desirability or undesirability of concentrating litigation of the claims in this particular forum; and,

d) The potential difficulties of managing this class action.

9. Plaintiffs' proposed "Notice of Class Determination," is sufficient to notify all potential class members of the existence of, and the procedures for inclusion in or opting out of the class action lawsuit. Plaintiffs can give notice by United States Mail to the last known address to all class members that can be identified through reasonable efforts. They can also notice the class action through the official journals of St. Charles Parish and the *New Orleans Times Picayune*. The notice provides sufficient information for the potential class members to either remain in the class or to opt-out of the class by using the included exclusion form.

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B. CONCLUSIONS OF LAW

1. The plaintiffs' proposed class satisfies the requirements of La.C.C.P. Article 591.

2. The plaintiffs' proposed class satisfies the requirements of La.C.C.P. Article 592.

3. The plaintiffs' proposed notice program satisfies the due process rights of class members.

C. FORM OF NOTICE

Plaintiffs' proposed "Notice of Class Determination," is sufficient to notify all potential class members of the existence of, and the procedures for inclusion in or opting out of the class action lawsuit. Plaintiffs will give notice by United States Mail to the last known address to all class members that can be identified through reasonable efforts. They will also notice the class action through the official journals of St. Charles Parish and the *New Orleans Times Picayune*. The notice will provide sufficient information for the potential class members to either remain in the class or to opt-out of the class by using the included exclusion form. Any class member who receives notice and fails to return an exclusion form by a designated deadline shall be presumed to have consented to the jurisdiction of the Court and to desire to be included in the class. Any class member who fails to return an exclusion form and who desires to be excluded from the class must present extrinsic evidence that the notice was not received in order to be excluded. The form of the notice to be used is attached hereto as Exhibit "A".

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IT IS ORDERED, ADJUDGED AND DECREED that plaintiffs' Motion for Class Certification is GRANTED. The Court certifies a class with the following definition and conditions under La.C.C.P. Article 591, et seq.:

> All those individuals who worked for the defendant, Monsanto Company, Inc., at the Luling, Louisiana plant any period of time during the years 1953 to 1985 and were exposed to noise levels in excess of 85 decibels on a regular basis.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the following attorneys and their law firms are appointed class counsel: Patrick W. Pendley; Donald Carmouche; Don Almerico; Victor L. Marcello; Nyle A. Politz; Pamela M. Pendley; and, Lawrence G. Gettys.

THUS DONE AND SIGNED on the 12th day of June 1997 in Hahnville, Louisiana.

s/ Kirk Granier
KIRK GRANIER, DISTRICT JUDGE

Appendix F

EXHIBIT "A"

TWENTY-NINTH JUDICIAL DISTRICT COURT
PARISH OF ST. CHARLES
STATE OF LOUISIANA

BUDDY GRAVER, ET AL

VERSUS

MONSANTO COMPANY, INC., ET AL

NO. 45,965 DIV. "D"

NOTICE OF CLASS DETERMINATION

TO: ALL THOSE INDIVIDUALS WHO WORKED FOR THE DEFENDANT, MONSANTO, INC., AT THE LULING, LOUISIANA PLANT ANY PERIOD OF TIME DURING THE YEARS 1953 TO 1985 AND WERE EXPOSED TO NOISE LEVELS IN EXCESS OF 85 DECIBELS ON A REGULAR BASIS, RESULTING IN HEARING LOSS, SHOULD READ THIS NOTICE CAREFULLY BECAUSE IT AFFECTS YOUR RIGHTS AND MAY BE BINDING ON YOU IN THE FUTURE:

A lawsuit was filed in March, 1996 as a class action on behalf of all individuals who worked for Monsanto for a period of time during the years 1953 to 1985 and were exposed to noise levels in excess of 85 decibels on a regular basis resulting in hearing loss.

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The petition for damages and subsequent supplemental and amending petitions alleged that defendant, Monsanto Company, Inc., and under the supervision and direction of its foreman, supervisors and superintendents herein named as defendants, were exposed to severe industrial noises, thereby causing the plaintiffs to suffer a severe high frequency hearing loss.

Defendants have denied all the essential allegations of the class claim. The date of the trial of this matter has not at this time been set.

Everyone who suffered hearing loss as a result of exposure to severe industrial noises at the Monsanto Company, Inc. plant in Luling, Louisiana during the period of time 1953 to 1985 is a class member and will be bound by this lawsuit with respect to the class claim *unless they specifically ask to be excluded.* If a person wishes to be excluded as set forth in this notice, he/she will *not* be bound by the outcome of this action. Any class member who desires exclusion from the class must request to be excluded from the class in writing by sending a letter or by completing and mailing the attached form to the address listed on this form. *This request for exclusion from the class must be postmarked no later than December 30, 1997 and need not state any reason for being excluded.* If you desire to be a member of the class, do nothing. You will be represented by the following counsel: Patrick W. Pendley; Donald T. Carmouche; Don Almerico; Victor L. Marcello; Nyle A. Politz; Pamela M. Pendley; and, Lawrence G. Gettys, and their law firms. Even if you do not request exclusion and continue as a member of the class, you have the right to appear in the class action and be represented by your own

counsel. If plaintiffs are successful on the class claim, all qualifying class members, who do not ask to be excluded, will share the benefit of any recovery. If judgment is tendered in favor of the defendants, class members will be denied any recovery.

If plaintiffs do not succeed in the class action, persons who did not exclude themselves from the class and who did not enter an appearance by their own attorneys will *not* be responsible for any of the cost of litigation. If plaintiffs' counsel are successful on the class claim, and recover a judgment for the class, they will ask the Court to approve a payment of their legal fees and expenses from the money received. If plaintiffs' counsel negotiate a settlement of the class action, they will ask the Court to approve payment of their legal fees and expenses from the settlement fund. The Court must approve the terms of any settlement, including any award of attorney's fees and expenses, and the class must be given notice of and the opportunity to object to the terms of any such settlement.

Any inquiry you may wish to make concerning the notice should be directed to the address listed in the *request for exclusion from class action form attached below*. The Court files in this action are available for inspection during regular office hours at the office of the Clerk of Court, 29th Judicial District Court, St. Charles Parish Courthouse, River Road, Hahnville, Louisiana.

Date: June 12, 1997 KIRK R. GRANIER
Hahnville, Louisiana. DISTRICT COURT JUDGE

* * * *

APPENDIX G — NOTICE OF DENIAL OF WRITS OF THE SUPREME COURT OF THE STATE OF LOUISIANA DATED MAY 4, 2001

THE SUPREME COURT OF THE STATE OF LOUISIANA

NO. 2001-CC-0811

BUDDY GRAVER, ET AL.

VS.

MONSANTO COMPANY, ET AL.

IN RE: Graver, Buddy et al; — Plaintiff; Applying for Supervisory and/or Remedial Writs, Parish of St. Charles, 29th Judicial District Court Div. E, Nos. 45,965; to the Court of Appeal, Fifth Circuit, No. 01-C-55

May 4, 2001

Denied.

CDK

JPV

CDT

JTK

PCC

Appendix G

CALOGERO, C.J. would grant the writ.
JOHNSON, J. would grant the writ.

Supreme Court of Louisiana
May 4, 2001

s/ [illegible]
Deputy Clerk of Court
For the Court

Supreme Court, U.S.
FILED
SEP 25 2001
CLERK

(2)

No. 01-349

In the Supreme Court of the United States

BUDDY GRAVER, ET AL
Plaintiffs-Petitioners

VERSUS

MONSANTO COMPANY, ET AL
Defendants-Respondents

From the Fifth Circuit Court of Appeal,
State of Louisiana
bearing Docket No. 01-C-55

Originating in the 29th Judicial District Court for the
Parish of St. Charles, State of Louisiana,
Suit No. 45,965, Division "D"

OPPOSITION OF MONSANTO COMPANY, ET AL TO PETITIONERS' APPLICATION FOR WRITS OF CERTIORARI AND/OR REVIEW

LEMLE & KELLEHER

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QUESTION PRESENTED

Where an erroneous class certification order is subsequently reversed on appeal before official notice of certification is ever issued, the unnamed putative class members have actual notice of the reversal, and the unnamed putative class members thereafter fail to file individual claims within the relevant state limitations period, are the due process rights of these class members violated by dismissal of their late-filed claims because they did not receive official notification of the appellate court's reversal of the erroneous certification order?

PARTIES TO THE PROCEEDING

The parties to the proceeding are correctly identified in Petitioners' writ application.

CORPORATION DISCLOSURE STATEMENT

Pharmacia Corporation owns 85% of the common stock of respondent Monsanto Company. The remaining 15% of the common stock is publicly traded.

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STATEMENT OF JURISDICTION

The statement of jurisdiction was presented correctly by the Petitioners.

CONSTITUTIONAL PROVISIONS AND RULES INVOLVED

The relevant provisions and rules were presented correctly by the Petitioners.

OPINIONS BELOW

The Petitioners' discussion of the lower court opinions contains a significant error. Specifically, Petitioners incorrectly state that this action was "decertified" by the Louisiana Supreme Court. Writ Application at 1. To the contrary, the Louisiana Supreme Court, via supervisory writ, simply reversed the erroneous holdings of the district court (and court of appeals) that had initially improperly certified the action as a class action. Thus, this action was not "decertified" after having properly been certified initially; rather, the Louisiana Supreme Court found that it was never a properly certified class action in the first place.

STATEMENT OF THE CASE

The Petitioners' statement of the case should be corrected as follows. First, as discussed in the Opinions Below section of this opposition, this action was not "decertified" by the Louisiana Supreme Court; rather, that court simply

reversed the lower courts' erroneous certification order. Second, for the reasons set forth more fully in the Argument section of this opposition, Respondents disagree with Petitioners' statement that "there existed a constitutional due process requirement requiring decertification notice to the affected class members." Writ Application at 4.

Additionally, Petitioners' statement of the case omits certain relevant facts. First, as a result of Monsanto's suspensive appeal and subsequent writ application from the erroneous certification orders of the district court and court of appeal, no notice of class certification was sent to the unnamed putative class members prior to the Louisiana Supreme Court's decision reversing the certification order. Accordingly, the putative class could not have relied upon such notice from any court. Second, the record demonstrates that the unnamed putative class members received actual notice of the decision. Specifically, when asked by the district court why the 100+ supplemental plaintiffs had not filed their amended petition sooner, counsel did not claim that the proposed plaintiffs did not know about the reversal of the erroneous class certification order, but rather responded that

> the simple answer, Your Honor, is these people began to get worried, began to get discouraged, did not want to consider pursuing individual claims. As you know, we're going to have 123 individual claims to present to the Court, but ultimately they did make the decision ....

Transcript of Proceedings of Exception of Prescription on Plaintiff's Third Amended and Supplemental Petition at 11.

Thus, the proposed plaintiffs, by counsel's own admission, knew that the court had held that the action could not proceed as a class action, and their delay in attempting to amend their petition was due solely to their doubts about whether to file individual claims. It is also important to note that the putative class in this case was not a large, geographically dispersed group of people, but rather a relatively small, geographically compact group, all of whom are represented by the very same attorneys who represent the named plaintiffs – the same attorneys who undisputedly received notice of the supreme court's denial of class certification.

ARGUMENT

PRESCRIPTION ACCRUED ONE YEAR FROM THE DATE OF THE LOUISIANA SUPREME COURT'S DENIAL OF CLASS CERTIFICATION, AND NOTICE OF THE DENIAL WAS NOT REQUIRED BY THE DUE PROCESS CLAUSE

It is undisputed that under both Louisiana and federal law, the filing of a class action petition "tolls" the running of the prescriptive period/statute of limitations with regard to all putative class members, whether named or unnamed. See Williams v. State, 350 So. 2d 131, 137 (La. 1977) (Louisiana law); Smith v. Cutter Biological, 770 So. 2d 392, 409-10 (La. App. 2d Cir. 2000) (Louisiana law); American Pipe and Constr. Co. v. Utah, 94 S. Ct 756, 766 (1974) (federal law). Under Louisiana law, the "tolling" is in the nature of an interruption rather than a mere suspension of the prescriptive period; thus, once the interruption ceases, the former

putative class members have the full original prescriptive period in which to file their individual claims.[1] See Orleans Parish School Bd. v. U.S. Gypsum Co., 892 F. Supp. 794 (E.D. La. 1995), aff'd, 114 F.3d 66 (5th Cir. 1997). The substantial body of federal cases (including three Supreme Court decisions), as well as the only Louisiana decision to address the issue, make it clear that the "tolling" caused by the filing of a class action petition ceases upon the court's denial of class certification. See Chardon v. Fumero Soto, 103 S. Ct. 2611, 2618 (1983); Crown, Cork & Seal Co. v. Parker, 103 S. Ct. 2392, 2398 (1983) ("Once the statute of limitations has been tolled, it remains tolled for all members of the putative class **until class certification is denied**. At that point, class members may choose to file their own suits . . . ."); American Pipe, 94 S. Ct. at 770 (stating that "the commencement of the class action in this case suspended the running of the limitation period only during the pendency of the motion to strip the suit of its class action character," and holding that the limitation period began to run again upon entry of the order denying class certification); Armstrong v. Martin Marietta Corp., 138 F.3d 1374, 1382 (11th Cir. 1998) (*en banc*) (concluding that "the tolling of the statute of limitations ceases as soon as the district court denies class certi-

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[1] In contrast, the law of other jurisdictions may provide for either suspension of the limitations period, in which case the former putative class members must file suit within the amount of time left in the limitation period on the day on which tolling took place, or an extension of the limitations period, in which case the former putative class members have a fixed period after tolling ceases during which to file suit. See Chardon v. Fumero Soto, 103 S. Ct 2611 (1983); Kathleen L. Cerveny, "Note: Limitation Tolling When Class Status Denied: Chardon v. Fumero Soto and Alice in Wonderland," 60 Notre Dame L. Rev. 686, 689-90 (1985).

fication"); Cf. Smith, 770 So. 2d at 409 ("At the very latest, prescription began to run again when the district judge ... actually entered the order of decertification").

Despite the clear and uniform holdings of these cases, Petitioners argue that the interruption ends not upon denial of class certification, but rather upon official, court-generated notice of the class certification denial, which, Petitioners claim, is required by the due process clause.[2] However, Petitioners have failed to cite a single case or any other authority to support the proposition that due process requires notice of a class certification denial.[3] Like Petitioners, Monsanto has been unable to locate any such case or authority.

The absence of a single case supporting Petitioners' argument, while a significant indicator that no such due process right exists, is not the only basis for such a conclu-

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[2] Petitioners concede that, prior to the 1997 amendments to Louisiana's class action articles, there was no statutory provision requiring official "class notice" of an order denying class certification. Petitioners also concede that the 1997 amendments do not apply to the present action, which was filed before the effective date of the amendments. Thus, Petitioners' argument is predicated solely upon the due process clause of the Constitution.

[3] The one case cited by Petitioners in their writ application concerns **discretionary** notice under Federal Rule of Civil Procedure 23(d)(2), not the due process clause. See Hardy v. Vought Corp., 30 Fed. R. Serv. 2d 484 (N.D. Tex. 1979). Similarly, Petitioners' citation to the Newberg class action treatise is also unavailing because the quoted language dealt with a true "decertification" rather than a denial of certification like that involved in the present case.

sion; the conclusion is implicit in both the existing jurisprudence on the issue of class action tolling as well as the federal statutory law governing class actions. With regard to the tolling jurisprudence, the cases cited above uniformly hold that tolling ceases upon denial of class certification, and not one of these cases mentions any necessity for issuance of notice of the class certification denial. This was true even in American Pipe, in which the class action filing had only suspended the running of the statute of limitations, giving the unnamed putative class members just 11days after the denial of class certification in which to file their individual claims. See 94 S. Ct. at 770. See also Chardon, 103 S. Ct. at 2611 (holding that after class certification is denied, the federal interest in assuring the efficiency and economy of the class action procedure that constitutes the basis for the tolling rule "is vindicated as long as each unnamed plaintiff is given as much time to intervene or file a separate action as he would have under a state savings statute applicable to a party whose action has been dismissed for reasons unrelated to the merits.")

With regard to the federal statutory framework for class actions, the absence of a due process requirement for notice is supported by the fact that there is not even a statutory requirement for notice of a court's denial of class certification. Federal Rule of Civil Procedure 23 requires notice to a class in only two instances: subsection (c)(2) requires notice of an order certifying a class under Rule 23(b)(3), and subsection (e) requires notice of "dismissal or compromise" of a class action. In addition to these two provisions for mandatory notice, Rule 23 contains a provision that allows for discretionary notice in other instances. This provision, contained in subsection (d)(2), states that the

court "may make appropriate orders ... (2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action Thus, despite requiring the issuance of notice in other circumstances, Rule 23 does not provide for mandatory notice of denials of class certification, which would certainly be expected if such notice were required by the due process clause as Petitioners claim.

While there are no federal cases holding that due process requires notice of class certification denial or similar rulings, there are several cases that discuss such notice outside of the due process context. The majority of these cases have considered the notice issue under Rule 23(d)(2), the discretionary notice provision.[4] Some of the cases in which the courts have utilized this discretionary power to require notice of an order similar to denial of class certification (such as an order narrowing of the scope of the putative class) have involved true instances of "decertification" - i.e., the action had previously been properly certified as a class action, then was later decertified by the district court on the basis of subsequent developments, such as the failure of the class representative to prosecute the action vigorously. See, e.g., Hardy v. Vought Corp., 30 Fed. R. Serv. 2d 484 (N.D. Tex. Apr. 2, 1979). Such cases are clearly distinguishable from the present action, which was never properly certified

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[4] Most courts hold that, in circumstances like the present case, Rule 23(e)'s mandatory notice provision is inapplicable because that provision applies only to voluntary, as opposed to involuntary, dismissals. See, e.g. Diaz v. Trust Territoly of Pacific Islands, 876 F.2d 1401, 1406 (9th Cir. 1989).

as a class action and in which notice of class certification was never promulgated. See Fed. R. Civ. P. 23 (Advisory Committee Notes) ("A negative determination [with regard to class certification] means that the action should be stripped of its character as a class action.")

In other cases involving the federal courts' discretionary power under Rule 23(d)(2) at the precertification stage, the courts have emphasized that notice is not necessary absent the likelihood of prejudice to the unnamed class members that would result from the absence of such notice. For example, in Bernard v. Gulf Oil Corp., 890 F.2d 735, 746 (5th Cir. 1989), the court held that discretionary notice is encouraged where unnamed class members: (1) received notice of their initial inclusion in the class; (2) relied on the class suit to protect their interests; and (3) would be prejudiced as a practical matter by their exclusion from the class. There, the court found that the plaintiffs had failed to demonstrate that these three elements were satisfied and declined to require notice of the court's narrowing of the scope of the class. See id. With regard to the question of prejudice, as a general matter the courts have been unwilling to find the requisite prejudice in light of the rule that the filing of a class action petition tolls the running of prescription. See, e.g., Marian Bank v. Electronic Payment Servs., Inc., No. 95-614-SLR, 1999 WL 151872 (D. Del. Mar. 12, 1999) (in holding that notice of denial of class certification was not required, the court reasoned that American Pipe's tolling rule "does not compel notification of putative class members upon the denial of class certification" and that "[i]f these potential plaintiffs have relied upon plaintiff to represent their claims, it is their duty, not the court's, to

keep apprised of the legal developments in plaintiff's case. The court has no obligation to awaken potential litigants for their lethargy."); Wallican v. Waterloo, 80 F.R.D. 492, 494 (N.D. Iowa 1978) (notice of voluntary dismissal at pre-certification stage was not required; putative class members' rights were not prejudiced or adversely affected because the dismissal occurred well within the statute of limitations period so that the putative class members could still bring suit on the same controversy); Bantolina v. Aloha Motors, Inc., 75 F.R.D. 26, 33 (D. Haw. 1977) (notice of withdrawal of motion to certify after initial granting of certification but prior to issuance of class notice was not required because "[t]he tolling of the statute of limitations eliminates the danger of prejudice to the unnamed members of the class," who could file their own suits). See also Diaz, 876 F.2d at 1407 ("Since American Pipe, courts have moved away from the idea that notice is required for all pre- certification dismissals"). [5]

In the present case, the Louisiana Supreme Court determined that this action is not, and thus has never been, properly certified as a class action. While the district court erroneously certified the class initially, official notification of the district court's order was never issued to the putative class. Thus, this is not a situation in which a class was properly certified, thereby creating class-related duties upon the

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[5] While the court ultimately required notice in Diaz, it did so only because the dismissal at issue there was a voluntary dismissal upon stipulation of the parties. The court reaffirmed the rule that "if the court determines for any reason that class certification should be denied, it can thereafter dismiss the class allegations without notice. In other words, Rule 23(e) notice is not required where the dismissal is involuntary." 876 F.2d at 1406.

court and the named plaintiffs, and officially brought to the attention of unnamed class members, thereby inducing them to rely upon the continued prosecution of the class action to pursue their own claims.

Further, even under the test used by the federal courts to determine whether **discretionary** notice should issue in a given case, notice would not have been required in the present case. Even assuming for the sake of argument that the unnamed putative class members initially received notice of filing of the suit or even informal, extra-judicial notice of the district court's erroneous class certification,[6] there is simply no evidence that they relied upon the class action to protect their interests or that they would be prejudiced by their exclusion from the class. First, under Louisiana law the excluded putative class members had the entire prescriptive period, i.e., one full year, from the supreme court's denial of class certification in which to file individual claims. As discussed more fully above, the federal courts have refused to find prejudice even where the excluded putative class

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[6] There is no evidence in the record demonstrating that the unnamed 123 putative class members received such notice, although the statements of counsel during the hearing on Monsanto's prescription exception indicates that they received notice not only of the initial filing and erroneous certification order, but also of the supreme court's decision denying class certification. In any event, if it is assumed that they received notice of the filing and erroneous class certification, there is no reason not to assume that they also received notice of the supreme court's denial of class certification, particularly in light of the fact that the putative class is relatively small, geographically concentrated, and is represented by the very same attorneys who have represented the named plaintiffs throughout this action.

members had only a few days in which to file their claims after the denial of certification. Second, Petitioners' counsel himself has indicated that the unnamed putative class members received actual notice of this Court's denial of class certification. Specifically, when asked by the district court why the 123 supplemental plaintiffs had not filed their amended petition sooner, counsel responded that

> [a]nd the simple answer, Your Honor, is these people began to get worried, began to get discouraged, did not want to consider pursuing individual claims. As you know, we're going to have 123 individual claims to present to the Court, but ultimately they did make the decision.

Transcript of Proceedings of Exception of Prescription on Plaintiff's Third Amended and Supplemental Petition at 11. Thus, counsel did not claim then (and has not claimed at any point in this proceeding) that the unnamed putative class members lacked actual notice of the supreme court's decision. It is also important to note that the putative class in this case was not a large, geographically dispersed group of people, but rather a relatively small, geographically compact group, all of whom are represented by the very same attorneys who represent the named plaintiffs - the same attorneys who undisputedly received notice of the supreme court's denial of class certification. Of course, where actual notice is present, there can be no prejudice, and concomitantly no due process violation, resulting from a failure to issue official notice. See, e.g., Bijeol v. Benson, 513 F.2d 965, 968 (7th Cir. 1975) (holding that "in the circumstances of this case, in which the class, as we redefine it, consists of prisoners in a

given category in one penitentiary and the likelihood is that all prisoners in the represented class were in fact informed about the action, due process did not require notice.").

Thus, due process did not require official notice of the supreme court's denial of class certification, and even if such notice had been required as a general matter, there was no due process violation in the present case because the unnamed putative class members received actual notice of the denial of class certification. The interruption ceased, and the one-year prescriptive period began to run again, on January 8, 1999, when the supreme court denied class certification. The Third Amending and Supplemental Petition was not filed until almost 21 months later, on October 3, 2000, and is therefore prescribed. The due process clause is inapplicable here with regard to the unnamed putative class members who simply "slept on their rights" after the supreme court's denial of class certification while deciding whether to file individual suits. See American Pipe, 94 S. Ct. at 756 (noting policy against rewarding plaintiffs who "sleep on their rights"). Consequently, the court of appeal properly vacated the district court's ruling and granted Monsanto's exception of prescription.

CONCLUSION

The unnamed putative class members simply cannot advance any valid reasons, legally or factually, for waiting twenty-one months to file their individual claims after the Louisiana Supreme Court denied class certification. While the result may at first glance appear harsh, as the trial court itself recognized, it is the result of Petitioners' own making. As a matter of law, their claims are prescribed, and there is no due process violation. Thus, the court of appeal's holding is correct, and this Court should deny Petitioners' writ application.

Respectfully submitted:

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